IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION TO COMPEL DEFENDANT SIMMONS FOODS, INC. TO DISCLOSE JOINT DEFENSE AGREEMENT AND INTEGRATED BRIEF IN SUPPORT THEREOF

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), respectfully moves this Court for an order compelling Defendant Simmons Foods, Inc. to disclose any joint defense agreement which it contends is applicable to its claims of privilege in this litigation.[1] In support of its motion to compel, the State shows as follows:

On or about July 2, 2007, Defendant Simmons Foods, Inc. ("Simmons") served on the State a privilege log pertaining to ESI it was withholding on the basis of a claim of privilege. *See* Ex. 1. One of the privileges claims asserted was a so-called joint defense privilege. *See* Ex. 1. Nowhere in the Simmons privilege log, however, is there any evidence provided which details or substantiates, *inter alia*, the existence of a joint defense agreement in this litigation, the parties to it, the date of its origin, or its scope of coverage. The State has therefore requested that

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[1] The State has attempted to resolve this dispute without Court involvement, but has been unsuccessful.

Simmons disclose to the State copies of the applicable joint defense agreement so that it can, as is its right, assess the applicability of the privileges and protections being claimed. *See* Ex. 2.[2]

Simmons initially resisted the State's request arguing that this Court had previously ruled that joint defense agreements are not discoverable. *See* Ex. 3. Simmons has subsequently resisted the State's request, arguing (1) that the joint defense agreement is not relevant to any of the issues in the case, and (2) that the joint defense agreement is privileged. *See* Ex. 4. None of Simmons' arguments has any merit.

1. The issue of the discoverability of the joint defense agreement is now ripe.

Simmons is simply incorrect that this Court had previously ruled that joint defense agreements are not discoverable. In its October 4, 2006 Order this Court merely ruled:

> Plaintiffs have not identified a privilege log or specific instance in which Plaintiffs have been denied documents or materials as protected by a joint defense agreement or privilege. The Court will not order the production of joint defense agreements to aide the evaluation of a privilege that is not specifically asserted or challenged. The Court will not decide such issues in the abstract.

DKT #932, p. 10. The Court is now faced with a specific, concrete dispute over the applicability of a series of joint defense privilege claims that require inquiry into the terms of the underlying joint defense agreement. The issue is now ripe for resolution.

2. The joint defense agreement is relevant.

The joint defense agreement is plainly relevant to the issue of the propriety of Simmons' joint defense privilege claims. "A party resisting discovery based on a claim of privilege has the burden of establishing that the privilege applies." *Carbajal v. Lincoln Benefit Life Company*, 2007 WL 1964073, *3 (D. Colo. July 2, 2007), *citing Peat, Marwick, Mitchell & Co. v. West*,

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[2] In the letter making this request, the State also pointed out to Simmons that its privilege log failed to comply with LCvR 26.4 in a number of other respects. Simmons has agreed to modify its privilege log to address these other deficiencies. *See* Ex. 3.

748 F.2d 540, 542 (10th Cir. 1984). "Under Fed. R. Civ. P. 26(b)(5), when a party withholds documents or other information based on the attorney-client privilege, the party 'shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.'" *Carbajal*, 2007 WL 1964073, *3.

"To invoke the joint defense privilege, in addition to showing each of the elements necessary to establish the attorney-client privilege or work-product immunity, a party also must establish that the withheld information (1) arose in the course of a joint defense effort and (2) was designed to further that effort." *Carbajal*, 2007 WL 1964073, *4, *citing In re Grand Jury Proceedings*, 156 F.3d. 1038, 1042-43 (10th Cir. 1998). A joint defense privilege claim fails where these elements are not established. *See In re Grand Jury Proceedings*, 156 F.3d. at 1043 ("As the district court correctly found, Intervenor has failed to meet the elements of a joint-defense privilege because he has failed to produce any evidence, express or implied, of a joint-defense agreement with the Hospital, and he has failed to show how the documents at issue here furthered the putative joint-defense strategy") (emphasis added). The joint defense agreement is thus plainly relevant. The State needs (and is entitled to) a copy of any joint defense agreement which Simmons contends is applicable to its claims of privilege in this litigation so that the State may "assess the applicability of the privilege or protection" being asserted. *See* Fed. R. Civ. P. 26(b)(5).

3. Simmons is incorrect that joint defense agreements are privileged.

Joint defense agreements are not themselves privileged. *See, e.g., United States v. Hsia*, 81 F.Supp.2d 7, 11 fn 3 (D.D.C. 2000) ("The defendant and the intervenors consistently have

maintained that both the existence of a joint defense agreement and its terms are privileged matters. The defendant and intervenors have cited three cases to support their assertions: *A.I. Credit Corp. v. Providence Washington Ins. Co., Inc.*, No. 96 Civ. 7955 AGS AJP, 1997 WL 231127, at *4 (S.D.N.Y. May 7, 1997); *United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 WL 693384, at *6 (N.D.N.Y. Sept. 28, 1992); and *In the Matter of the Two Grand Jury Subpoenas Duces Tecum Dated January 5, 1995*, No. 25016/95 (N.Y. Sup. Ct. 1995) (Roberts, J.). . . . The facts in the cited cases are very different from those here, and none of the decisions contains any analysis; indeed, the court in *A.I. Credit* merely cited *Bicoastal* without discussion. These decisions do not convince this Court that either the existence or the terms of a JDA are privileged."); *Trading Technologies International, Inc. v. eSpeed, Inc.*, 2007 WL 1302765, *2 (N.D. Ill. May 1, 2007) ("We have previously noted that should the joint defense agreement be memorialized in writing, defendants should produce a copy of the agreement to plaintiff").

In sum, none of Simmons' objections to disclosing the applicable joint defense agreement has any merit. The agreement is relevant and not privileged. And, in light of Simmons' naked, unsubstantiated joint defense privilege claims, the dispute over the disclosure of the joint defense agreements is now ripe for resolution.

WHEREFORE, premises considered, this Court should enter an order compelling Defendant Simmons Foods, Inc. to disclose any joint defense agreement which it contends is applicable to its claims of privilege in this litigation.

Respectfully Submitted,

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